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23 RECORDS, INC., BRUNSWICK RECORD
24 CORPORATION and MALACO, INC.

25 (SEE SIGNATURE PAGE FOR ADDITIONAL PARTIES)

26 **UNITED STATES DISTRICT COURT**
27 **CENTRAL DISTRICT OF CALIFORNIA**

28 ABS ENTERTAINMENT, INC., an
29 Arkansas corporation, BARNABY
30 RECORDS, INC., a California corporation,
31 BRUNSWICK RECORD CORPORATION,
32 a New York corporation and MALACO,
33 INC., a Mississippi corporation, each
34 individually and on behalf of all others
35 similarly situated.

36 Plaintiffs,

37 v.
38 CBS CORPORATION, a Delaware
39 corporation; CBS RADIO INC., a Delaware
40 corporation; and DOES 1 through 10,

41 Defendants.

42 Case No. 2:15-cv-6257-PA (AGRx)

43 **JOINT STATUS REPORT**

1 Pursuant to the Court's November 16, 2018 Minute Order (Dkt. 116), the
 2 parties timely met and conferred, and submit this Joint Status Report.

3 **I. Factual And Legal Issues Remanded For Resolution.**

4 The Ninth Circuit reversed the granting of CBS's motion for summary
 5 judgment (Dkt. 104), the exclusion of the testimony of Paul Geluso (*id.*), the
 6 admissibility of the Triton Reports (*id.*), and the striking of ABS's class action motion
 7 as untimely (Dkt. 65). *Abs Entm't v. CBS Corp.*, No. 16-55917, 2018 U.S. App.
 8 LEXIS 30808, at *4-5 (9th Cir. Oct. 31, 2018). The Ninth Circuit remanded the case
 9 to this Court for further proceedings consistent with its opinion. *Id.*

10 **II. Recent Legal Developments That Command the Proposed Case
 11 Management Recommendation Below.**

12 The primary substantive issue in this case is whether CBS is liable for the
 13 unauthorized public performance of pre-1972 recordings in California under state law
 14 (the secondary substantive issues is whether CBS is liable for the unauthorized
 15 reproduction and distribution of those recordings). Two recent events, however, have
 16 altered the landscape of this case. First, the President of the United States signed on
 17 October 11, 2018 the Music Modernization Act (the "MMA"), which prospectively
 18 treated pre-72 recordings like post-72 recordings *for digital audio transmissions* and
 19 preempts state law claims for the prior three years if certain conditions are met
 20 (including payment), but *only for digital audio transmissions*. The MMA, however,
 21 did not preempt state law with respect to non-digital audio transmissions, such as
 22 terrestrial broadcasts.

23 Second, the question of whether the right of public performance is included in
 24 the bundle of exclusive rights of owners of pre-72 recordings under California law
 25 was recently certified by the Ninth Circuit to the California Supreme Court in the case
 26 of *Flo & Eddie, Inc. v. Pandora Media, Inc.*, 851 F.3d 950 (9th Cir. 2017). The
 27 question remains pending before the California Supreme Court, where it is fully
 28

1 briefed and awaiting a date for oral argument. *Flo & Eddie, Inc. v. Pandora Media,*
2 *Inc.*, California Supreme Court Case No. S240649.

3 **III. Proposal for Resolving Remanded Issues.**

4 Considering that the primary legal question involved in this case is set to be
5 resolved imminently by the California Supreme Court, and in order to promote
6 judicial economy, the parties recommend the following:

- 7 A. The Court stays the case pending the decision by the California Supreme
8 Court in *Pandora*;
- 9 B. Within sixty (60) days following the decision by the California Supreme
10 Court in *Pandora*, the parties will meet and confer in good faith to attempt to
11 settle the case; and
- 12 C. At the conclusion of that sixty (60) day period, if the parties have not settled
13 the case, the parties will file another Joint Status Report concerning the case
14 and further recommended proceedings.

15 DATED: December 12, 2018 Respectfully submitted,

16 MCKOOL SMITH HENNIGAN, P.C.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on December 12, 2018 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system. Any other counsel of record will be served by electronic mail, facsimile, U.S. Mail and/or overnight delivery.

/s/ Elizabeth B. Morrin

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